

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON DIVISION**

KELLI SMITH, individually and on behalf of a class of similarly situated female employees, RACHEL MOUNTIS, AMY SHURSKY and KATE WHITMER ,

Plaintiffs,

versus

MERCK & CO., INC.,

Defendant.

) Docket No. 3:13-cv-02970-MAS-LHG
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Courtroom No. 7E
Clarkson S. Fisher Building
& U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608
)
October 13, 2015
3:22 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE RE: PLAINTIFFS'
DISCOVERY REQUEST
BEFORE HONORABLE LOIS H. GOODMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: Sanford Heisler, LLP
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For the Defendant: Morgan Lewis & Bockius, LLP
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1 TRENTON, NEW JERSEY OCTOBER 13, 2015 3:22 P.M.

2 (Call to order of the Court)

3 THE COURT: (Recording commences with the following)

4 ... put that on the record, and then we can address what else
5 we need to do.

6 I have -- well, we have several letters where
7 plaintiff is seeking additional discovery from defendant Merck.
8 We discussed this at length during our conference on August 10,
9 2015, which was also conducted on the record. And at that
10 time, I had additional questions which we went into during the
11 call, and I asked for further briefing. That was presented to
12 the Court by letter dated August 13, 2015, on the docket as
13 Docket Entry 73.

14 In reviewing the letter, it was clear to me that
15 plaintiffs were not seeking the discovery we are talking about
16 for purposes of the motion to certify the collective action,
17 one of the original concerns that the Court had. And that
18 motion has since been filed.

19 In fact, in the interim, plaintiffs have filed
20 several motions:

21 There is a motion for leave to amend that was filed
22 on September 11, 2015, that is Docket Entry 76;

23 There is a motion to certify the class -- actually to
24 certify the collective action, that is Docket Entry 77;

25 And there is a motion to also certify the collective

1 action under the Equal Pay Act, along with a motion for
2 equitable tolling, and that is Docket Entry -- well, we have
3 Docket Entry 78 and 79.

4 Now with regard to the requests that plaintiff has
5 made, I am going to go through them. But I am not planning to
6 set out with detail what each party has argued, just set out
7 sufficient description of each party's position so that you
8 understand where I am coming from.

9 Plaintiff is seeking personnel and pay discovery back
10 to the beginning of 2009 with regard to potential class members
11 -- actually not with regard to class members, but outside of
12 the class.

13 Merck has indicated that it has provided personnel
14 and pay data starting December, 2010.

15 The difference here is with regard to data for people
16 who would have otherwise been potential class members, and
17 their comparators, but who left the company.

18 So just to clarify, Merck says it has produced all
19 data for people who are potential class members, and their
20 comparators, who have remained with the company. If they left
21 prior to December, 2010, their information has not been
22 produced.

23 The parties disagree as to the relevant period for
24 discovery, both cite cases supporting their views. And the
25 issues relate to both Title VII claims and Equal Pay Act

1 claims.

2 The arguments as to the appropriate time period for
3 discovery are different for Title VII as opposed to the EPA
4 claims.

5 With the Title VII claims, plaintiffs point to cases
6 allowing discovery for a period prior to the proposed class
7 period. Plaintiffs say it is essential for them to get that
8 information in order to determine whether there is a pattern
9 and practice of discrimination, or a facially neutral practice
10 that has a disparate impact.

11 They express a concern that limiting discovery to the
12 period selected by Merck runs the risk of skewing the data.
13 They say that the case law supports discovery for a reasonable
14 period prior to the damages/liability period.

15 Merck, on the other hand, says it has already
16 provided the pre-liability discovery as to class members and
17 their comparators from the date of hire, regardless of whether
18 it was before or after December, 2010. This, according to
19 Merck, constitutes four and a half years of data for
20 approximately 5,800 individuals.

21 They say the distinction plaintiffs are making, and
22 the discovery plaintiffs are seeking, is irrelevant as a
23 result.

24 They also say that discovery should not include data
25 for individuals whose claims are time-barred. Now that is all

1 with regard to the Title VII claims.

2 With regard to the EPA, or Equal Pay Act, claims,
3 there are different arguments, mostly focused on how far back
4 plaintiffs' claims go. This depends, in large part, on the
5 tolling agreements in place between the parties and how those
6 agreements should be interpreted.

7 Plaintiffs also ask the Court to take into
8 consideration their motion for equitable tolling of the Statute
9 of Limitations for the EPA claims.

10 Based on their tolling agreements, plaintiffs say the
11 claims should be viewed as dating back to April, 2010, at the
12 latest, and possibly sometime in 2009 if equitable tolling is
13 granted.

14 Merck disagrees as to how the tolling agreement from
15 2012 should be read, and asserts that the EPA claims should
16 only go back to May, 2011, at most.

17 The equitable tolling motion has been filed, as I
18 said earlier, and is now pending before Judge Shipp. I have no
19 doubt that at some point, the interpretation of the 2012
20 tolling agreement will be before Judge Shipp, as well. I do
21 not intend to decide those motions as part of this discovery
22 dispute, nor would it be appropriate to do so.

23 In terms of discovery, I do find that plaintiffs had
24 made a cogent argument with regard to the tolling of the EPA
25 claims, that discovery should go back to some point before

1 December, 2010.

2 And with regard to the Title VII claim, that
3 discovery should go back a reasonable period before the
4 liability/damages period.

5 Based on that, I am persuaded that a reasonable
6 period before December, 2012 is appropriate.

7 The question then is what is reasonable? Because I
8 am not deciding on this call, or at any point, the tolling
9 issue; that is before Judge Shipp. I am not basing the time
10 frame on the possibility that claims from 2009 would all be
11 allowed in the case. Frankly, that is fairly speculative at
12 this point.

13 Rather, I look instead to the burden on Merck in
14 considering what would constitute a reasonable period.

15 Merck says that they would have to create two queries
16 to find out and identify employees who are sales
17 representatives from January 1, 2009 to November 30, 2010. The
18 second query would extract the data for the individuals so
19 identified.

20 This becomes more complicated, however, prior to mid-
21 2009 when Merck changed its H.R. computer system. For that
22 pre-mid-2009 period, Merck would have to access the legacy
23 database and deal with it separately.

24 I find that it is not an undue burden for Merck to
25 create the queries and extract the data for the period in which

1 the current H.R. system has been in place.

2 That means that I am instructing Merck to pull and
3 produce data for employees who were sales representatives from
4 mid-2009 when the current system was implemented, to December,
5 2010 when they started their actual production.

6 I find that this would provide a reasonable period
7 prior to the class liability period for Title VII purposes, and
8 would also provide the data, if plaintiffs are correct, as to
9 the effect of the 2012 tolling agreement.

10 So that is what I want Merck to do. That is my
11 finding. I would like to hear from counsel for Merck now as to
12 how long it will take to accomplish this so that we can stay on
13 schedule. Counsel?

14 MS. KATZENSTEIN: Thank you, Your Honor. I think
15 that I will just have to go back and double-check with my
16 client to confirm. I know the last time we had said, I believe
17 it was two weeks, and had stipulated, if necessary, with
18 plaintiffs' counsel to an initial day, I don't think that
19 become necessary. But I know it was a pretty significant time
20 crunch for our client. So I would expect that we would need --
21 probably three weeks is more realistic for this pull, just
22 given the last experience.

23 THE COURT: All right. And where does that leave us
24 in terms of the larger schedule? We have motions pending. We
25 have fact discovery ongoing, and a separate schedule for the

1 Rule 23 class cert motion.

2 Ms. Marcuse, any comment?

3 MS. MARCUSE: Your Honor, I mean I think that we
4 should be able to stay on schedule.

5 I would just like to clarify, you know, my
6 understanding is that the data pull here is going to be less
7 significant than what took -- well, no, I guess it's going to
8 be about the same amount of time.

9 I'm just, you know, a little bit concerned about the
10 timing. If it could be done within two weeks, rather than
11 three, that would certainly be our preference. But for the
12 rest, we don't -- we absolutely don't want to hold up the
13 schedule in any way.

14 MS. KATZENSTEIN: And I would just note I think we
15 will still be, you know, just finishing up with conditional
16 certification briefing, and plaintiff will be doing their
17 reply.

18 So I wouldn't expect that -- in terms of where we are
19 in discovery, and what we have planned going forward, that
20 anything would be largely different, whether it would take us
21 that additional week or not. I just know based on kind of
22 allowing the client sufficient time to pull that information,
23 getting their infrastructure in gear to do it, irrespective of
24 the time frame, it's the same process in terms of pulling the
25 data.

1 And so I think that three weeks would give us that
2 extra cushion to make it less burdensome for the client.

3 THE COURT: All right. Well, frankly, whether it's
4 two weeks or three weeks, I would like you to get it going
5 promptly, and make every effort to get it done as expeditiously
6 as possible.

7 MS. KATZENSTEIN: Yes, Your Honor.

8 THE COURT: I am not, at this point, changing
9 anything else in the schedule.

10 I am going to ask Ms. Marcuse to prepare an order
11 from today, provide it to defense counsel before you submit it.
12 And then send it in with a notation that everybody has signed
13 off on the language of it. All right?

14 MS. KATZENSTEIN: Yes, Your Honor.

15 MS. MARCUSE: Yes, Your Honor.

16 THE COURT: Now with regard to the motion to amend
17 that is on the docket, is that opposed?

18 MS. KATZENSTEIN: Yes, Your Honor. Merck will be
19 filing its opposition on Friday, October 16th.

20 THE COURT: And I hate to do this at this point, I
21 usually remember to do it in the beginning, and ask you when
22 you speak to state your name. Just in case someone gets a
23 transcript, and we don't have the poor transcriber trying to
24 figure out who is speaking.

25 Was that Ms. Katzenstein?

1 MS. KATZENSTEIN: Yes, Your Honor; I apologize.

2 THE COURT: Okay. All right. So when that is fully
3 briefed, we will take a look at it.

4 What I would like to do is set you up for a call in a
5 couple of months just as a status call to make sure that
6 everything is moving along as it should be. Let me get the
7 calendar.

8 (Pause)

9 THE COURT: I don't know if you all will be working
10 the week between Christmas and New Year's, it is a dreadful
11 time, but many of us will be working. Can we do a call on
12 December 29? Otherwise it will be off until January.

13 MS. KATZENSTEIN: This is --

14 MS. MARCUSE: This is Deborah Marcuse -- I'm sorry.

15 MS. KATZENSTEIN: No go ahead.

16 MS. MARCUSE: That works for us.

17 MS. KATZENSTEIN: Yes, and this is Chrissy
18 Katzenstein. That works for us, as well.

19 THE COURT: All right. So we are all working that
20 week. So let's have a call December 29 at 10 a.m.

21 MS. MARCUSE: Thank you, Your Honor.

22 THE COURT: I will ask --

23 MS. MARCUSE: This is Deborah Marcuse.

24 THE COURT: Thank you. I will ask defendant to
25 initiate the call. If you have any problems before then,

1 please let me know. But otherwise, I will expect discovery to
2 be moving along, and these motions to be briefed, and we will
3 see where we stand.

4 MS. KATZENSTEIN: Thank you, Your Honor.

5 THE COURT: All right. Anything else?

6 MS. MARCUSE: No, Your Honor. Not from plaintiffs,
7 Your Honor.

8 MS. KATZENSTEIN: Not from defendant, Your Honor.

9 THE COURT: All right. Thank you, all, very much. I
10 will talk to you in December.

11 MS. KATZENSTEIN: Thank you.

12 MS. MARCUSE: Thank you very much. Bye-bye.

13 THE COURT: Bye-bye.

14 (Whereupon, at 3:38 p.m., the hearing was adjourned.)

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4 I, KAREN HARTMANN, a certified Electronic Court
5 Transcriber, certify that the foregoing is a correct transcript
6 from the electronic sound recording of the proceedings in the
7 above-entitled matter.

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10 Karen Hartmann, AAERT CET**D0475 Date: October 16, 2015
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